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No. 82-607

IN THE

Supreme Court of the United States

October Term, 1982

RICHARD STEPHEN DUNN,

Petitioner

v.

NATIONAL RAILROAD PASSENGER CORPORATION
a/k/a AMTRAK

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY OF PETITIONER TO BRIEF FOR RESPONDENT

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REPLY OF PETITIONER

The Brief of the Railroad repeats itself in saying that the law suit in the State Court is an "exact duplication" and an attempt to "relitigate the exact same Federal Employers' Liability action which was settled and dismissed" by the Federal Court. Nothing could be further from the truth. In fact, it is the Railroad which seeks to relitigate, in the Federal Court, the precise issue decided by the State Court against the Railroad, without exhausting the appellate process of the State Court system.

The Railroad's argument is intended to mislead because it equates the Complaints (the formal pleadings) filed in the Federal and State Courts with the cause of action (litigation encompassing all claims raised by the pleadings).

While the Petitioner may have commenced the State Court suit by a Complaint similar to the one used originally in the Federal Court, this was merely a procedural mechanism, utilized as the most effective, if not the only, way to test the validity of the release. In fact, the Railroad did file an Answer to the Complaint, pleading the Release. When the plaintiff filed his Reply, the issue was raised (A6 to A12 herein). The Railroad then moved for summary judgment, making the same arguments which it is making in its Brief to this Court, and the State Court held that a jury question was raised (A5, Original Petition for Writ of Certiorari). It was only then that the Railroad applied to the Federal Court for an injunction.

There is no issue of *res judicata*. Whether there was a final judgment in the F. E. L. A. action (it is argued in the Petition for Certiorari that there is not a final judgment) is immaterial. The validity of the release is the issue in the State Court case.

If the position of the Railroad were correct, the question as to whether a release was obtained by fraud or mutual mistake could rarely be raised. The law is to the contrary. *Scanlon v. Pittsburgh*, 319 Pa. 477, 181 A. 565 (1935); *Van Ormer v. Osborn*, 255 Pa. 47, 99 A. 161 (1916).

The case of *Gambocz v. Yelencsics*, 468 F. 2d 837 (3rd Cir., 1972) is not applicable to this case because in the *Gambocz* case the lower court dismissed the Complaint with prejudice. This was a judicial determination, not an attempt to settle a case on a purported agreement between the parties.

The case of *Lawlor v. National Screen Service*, 349 U. S. 322, 75 S. Ct. 865, 99 L. Ed. 1122 (1955), cited by the Railroad, actually supports the position of the Petitioner. This was an antitrust case. Prior to the case before the Court, there had been another case, which was settled. Defendants moved to dismiss the second case on the ground of *res judicata*. The motion was granted by the District Court and affirmed by the Third Circuit. This Court said, in reversing:

> That both suits involved essentially the same course of wrongful conduct is not decisive, such a course of conduct—for example, an abatable nuisance —may frequently give rise to more than a single cause of action. 75 S. Ct. 865, 868.

The following language by the Court is particularly pertinent:

> Acceptance of the respondents' novel contention would in effect confer on them a partial immunity from civil liability for future violations. Such a result is consistent with neither the antitrust laws nor the doctrine of *res judicata*. 75 S. Ct. 865, 869.

Respondent also cites the case of *Mitchum v. Foster*, 92 S. Ct. 2151, 407 U. S. 255, 32 L. Ed. 2d 705 (1972). The conclusion by the Court was:

> Today we decide only that the District Court in this case was in error in holding that, because of the Anti-Injunction statute, it was absolutely without power to enjoin a proceeding pending in a state court under any circumstances whatsoever.

Petitioner has not made, nor does he now make, such an argument. It is conceded that a state court proceeding may be enjoined in a proper case, but this is not such a case, because the issue before the State Court was never before the Federal Court. The State Court has held that the pleading before it raises a jury question as to the validity of a release. This issue was never previously before any court. The Railroad has been creating a false trail by basing all of its arguments on the pleadings rather than the cause of action. The fact is that the railroad by its own Answer to the Complaint brought the question of the validity of the Release before the State Court, as was intended.

Respectfully submitted,

JOSEPH SMUKLER
Attorney for Petitioner

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Appendix.

COMMON PLEAS OF PHILA.

JULY TERM, 1981

No. 2280

RICHARD STEPHEN DUNN

v.

NATIONAL RAILROAD PASSENGER CORP.
a/k/a AMTRAK

DEFENDANT'S ANSWER TO PLAINTIFF'S COMPLAINT

All averments of plaintiff's complaint are at issue pursuant to the Pennsylvania Rules of Civil Procedure without necessity of answer.

NEW MATTER

1. There was no accident of March 23, 1979 nor any injury to plaintiff resulting therefrom.

2. Plaintiff's injuries were caused by pre-existing problems and/or conditions unrelated to his railroad employment.

3. Plaintiff brought an identical cause of action against defendant in the United States District Court for the Eastern District of Pennsylvania. A true and correct copy of plaintiff's complaint is attached hereto as Exhibit A.

4. The action brought in the United States District Court was settled in open Court, a transcript of the terms and conditions of that agreement are attached hereto as Exhibit B.

5. Defendant has complied with all the requirements of the aforementioned transcript.

6. Plaintiff executed a release which is attached hereto as Exhibit C.

7. The action brought in the United States District Court was dismissed with prejudice in accordance with the provisions of Rule 23(b) and is attached hereto as Exhibit D, and a Stipulation to Dismiss, (D-1).

WHEREFORE, the instant action is barred by the execution of the release and is barred by the doctrine of res judicata by the dismissal with prejudice of the prior identical cause of action.

SWARTZ, CAMPBELL & DETWEILER

By

Richard L. Goerwitz, Jr.

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } SS

Benjamin S. Bremer, being duly sworn according to law deposes and says that he is authorized to take this affidavit on behalf of defendant; that the facts set forth in the foregoing answer to plaintiff's complaint and new matter are true and correct to the best of his knowledge, information and belief.

/s/ BENJAMIN S. BREMER
Benjamin S. Bremer

SWORN TO AND SUBSCRIBED
before me this 29th day
of July, 1981.

NOTARY PUBLIC
My Commission Expires: 10/15/81

IN THE
COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

JULY TERM, 1981

No. 2280

RICHARD STEPHEN DUNN

v.

NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK

PLAINTIFF'S REPLY TO NEW MATTER

AND Now, this fourth day of August, 1981, comes Richard Stephen Dunn, the plaintiff above-named, by his attorneys, Meyer, Lasch, Hankin & Poul, Esquires, and in reply to the New Matter contained in the Answer filed by the defendant in the above case, avers as follows:

1. Denied. There was an accident on March 23, 1979 in which the plaintiff sustained injuries, and this suit is brought to recover damages therefor.

2. Denied that plaintiff's injuries were due to pre-existing problems and/or conditions unrelated to his railroad employment. Plaintiff sustained injuries during the course of his employment with the railroad, and plaintiff has brought this suit to recover therefor.

3. Admitted.

4. Admitted that the case in the United States District Court was settled, but the settlement was obtained either by the fraud of the defendant, or as a result of a mutual mistake. This case was settled during the course of the trial because the defendant argued that the plaintiff was able to work. The plaintiff agreed to a settlement of $80,000, rejecting an offer of an additional $10,000 for a resignation because by returning to work as defendant maintained he could, the plaintiff had an earning capacity of approximately $750,000 with this defendant. On October 2, 1980, plaintiff was examined by a physician for the defendant and was approved for work, Exhibit "A". On October 15, 1980, the same medical examiner placed restrictions on plaintiff and the defendant refused to permit the plaintiff to work, Exhibit "B".

5. Denied. The defendant did not comply with the requirements of the transcript or with the terms of the settlement because the defendant has refused to permit the plaintiff to return to work contrary to the terms of the settlement agreement which was obtained either through the fraud of the defendant or as a result of a mutual mistake. The plaintiff rejected an offer of an additional $10,000 for a resignation, relying on the argument of the defendant that he was able to work, because by returning to work as defendant maintained he could, the plaintiff had an earning capacity of approximately $750,000 with this defendant. On October 2, 1980, plaintiff was examined by a physician for the defendant and was approved for work, Exhibit "A". On October 15, 1980, the same medical examiner placed restrictions on plaintiff and the defendant refused to permit the plaintiff to work, Exhibit "B".

6. Admitted that the plaintiff executed the release attached to the defendant's answer. It is denied that this

is a valid release because it was obtained either through the fraud of the defendant or as a result of a mutual mistake. This case was settled during the course of the trial because the defendant argued that the plaintiff was able to work. The plaintiff agreed to a settlement of $80,000, rejecting an offer of an additional $10,000 for a resignation, because by returning to work as defendant maintained he could, the plaintiff had an earning capacity of approximately $750,000 with this defendant. On October 2, 1980, plaintiff was examined by a physician for the defendant and was approved for work, Exhibit "A". On October 15, 1980, the same medical examiner placed restrictions on plaintiff and the defendant refused to permit the plaintiff to work, Exhibit "B".

7. Admitted that the case in the United States District Court was dismissed with prejudice. It is denied that this dismissal is now enforceable because it was the result of a settlement reported to the United States District Court which was obtained either through the fraud of the defendant or as a result of a mutual mistake. This case was settled during the course of the trial because the defendant argued that the plaintiff was able to work. The plaintiff agreed to a settlement of $80,000, rejecting an offer of an additional $10,000 for a resignation, because by returning to work as defendant maintained he could, the plaintiff had an earning capacity of approximately $750,000 with this defendant. On October 2, 1980, plaintiff was examined by a physician for the defendant and was approved for work, Exhibit "A". On October 15, 1980, the same medical examiner placed restrictions on plaintiff and the defendant refused to permit the plaintiff to work, Exhibit "B".

8. Denied. This case is not barred by the release or by the doctrine of Res Judicata. The release was obtained

as a result of either the fraud of the defendant or as a result of a mutual mistake, and is an issue for the jury. The doctrine of Res Judicata is not applicable because this case was not tried to verdict, and the dismissal by the court was a result of the report of settlement, which as stated previously was a result of either the fraud of the defendant or as a result of a mutual mistake.

MEYER, LASCH, HANKIN & POUL

By: /s/ ALBERT M. HANKIN
Albert M. Hankin
Attorneys for Plaintiff

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } SS

JOSEPH SMUKLER, being duly sworn according to law, deposes and says that he is of counsel for the plaintiff and that he makes this Affidavit in behalf of the plaintiff, being authorized so to do, and that the facts contained in the foregoing Reply to New Matter are true and correct to the best of his knowledge, information, and belief.

/s/ JOSEPH SMUKLER
Joseph Smukler

SWORN TO AND SUBSCRIBED
before me this 4th day
of August, 1981.

SAMANTHA NARELLE KIRKLAND
Notary Public

Samantha Narelle Kirkland
Notary Public, Phila., Phila. Co.
My Commission Expires Dec. 3, 1984

AUTHORIZATION FOR EXAMINATION OR TREATMENT

To be filled out by Personnel Manager:

Name _____ Medical Examiner _____

Position _____ Address _____

Social Security No. _____

Reason for Examination

- ☐ Pre-employment
- ☐ In-service
- ☐ Return to service
- ☐ Change of Position
- ☐ Treatment of Injury
- ☐ Other _____

Examination Required

- ☐ Physical
- ☐ Chest X-Ray
- ☐ Spine X-Ray
- ☐ Other _____
- ☐ Urinalysis
- ☐ Complete Blood Count
- ☐ Serology

Signature of Personnel Manager _____

Date _____

To be filled out by Medical Examiner:

I have personally examined Richard Dunn and have reviewed the results of the requested lab and X-ray procedures. I have determined that this person:

- ☑ does meet medical standards
- ☐ does not meet medical standards
- ☐ decision deferred to NRPC Medical Director for the following reasons: _____

Signature of Medical Examiner _____

Date 10-1-80

ORIGINAL COPY - RETURN TO REQUESTING OFFICER

NRPC—MED-1

Exhibit "A"

HEALTH SERVICE CORPORATION

PENN CENTER MEDICAL CLINIC
IVB BUILDING - 24 LOWER LOBBY
1700 MARKET STREET
PHILADELPHIA, PENNSYLVANIA 19103
215 564-2229 · 215 564-2230

RETURN TO WORK MEDICAL APPROVAL

WITH LIMITATIONS

Name: Richard Dunn

Company: Conrail

Date Examined: 10-14-80 Job: Trainman

An impartial Return To Work Medical Examination has been performed to determine if this person's physical capabilities, medical condition, mental abilities, and emotional make-up are suitable to perform all usual duties associated with the regular job without endangering the health and safety of the individual or of fellow employees.

Based upon the medical information provided by the individual and the treating health care provider, and the physical findings, the opinion of the Examiner is that this individual is able to safely perform any type of work associated with the regular job with the following limitations:
Pending Re-location of Release from Dr. Klingoffer.

- ☐ No lifting of objects over 50 lbs. No heavy physical exertion. Limited to Sedentary, Light, and Medium Work only.
- ☐ No lifting of objects over 50 lbs. No excessive bending, twisting, stooping, climbing. Limited to Sedentary, Light, and Medium Work only.
- ☑ No lifting of objects over 20 lbs. Minimal physical activity. No prolonged standing or walking. Minimum bending, stooping, squatting, twisting, reaching, and climbing. Limited to Sedentary and Light Work.
- ☐ No lifting of objects over 10 lbs. Occasional standing and walking. Sedentary Work only.
- ☐ Limited to work duties not requiring good vision.
- ☐ Limited to work duties not requiring color vision.
- ☐ Limited to work duties not requiring good hearing.
- ☐ Limited to work duties not requiring operation of motor vehicles or other moving equipment.

Date To Begin Work: _____

Signed: Della Fenner Schreiber, MD

Exhibit "B"